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NO. 81-5152

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

OMAR TAYLOR,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

THOMAS R. ALLISON
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

QUESTIONS PRESENTED

1. Whether a petition not timely filed should be reviewed absent any request for extension or any good cause shown for failure to comply with rules.

2. Whether the question of fingerprint comparison is within the jurisdiction of the Supreme Court where this issue was not the subject of the opinion of the Alabama appellate court and was not expressly reviewed by the highest court of the State.

3. Whether the Alabama Supreme Court properly found the petitioner's confession was admissible in light of Dunaway.

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OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals appears in petitioner's Appendix as "A". The opinion of the Supreme Court of Alabama appears in petitioner's Appendix as "B". The opinions of the Alabama Courts can be found

in the reporter as Taylor v. State, 399 So. 2d 875 and 881 (1981).

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. §1257 (3), and has presented two issues for review. It is respondent's position that this Court is without jurisdiction to consider issue number one (finger-prints) since this issue was not addressed in the opinion of the Court of Criminal Appeals and was not expressly passed on by the Alabama Supreme Court.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case as set forth in the Opinion of the Alabama Supreme Court and the Court of Criminal Appeals.

REASONS FOR DENIAL OF THE WRIT

1. THE PETITION WAS NOT TIMELY FILED AND ABSENT ANY REQUEST FOR EXTENSION OR ANY GOOD CAUSE SHOWN, PETITION SHOULD BE DENIED.

The petitioner in this case has been represented by the same counsel through the trial, through the Alabama appellate courts, and before this Court. The Supreme Court of Alabama denied the application for rehearing on April 10, 1980, and the petition for a writ of certiorari was filed before this Court on July 27, 1981, 107 days later.

Respondent recognizes that the procedural rules, such as Rule 20, are not jurisdictional and can be relaxed by the court. Sanabria v. United States, 437 U. S. 54, 57 L. Ed. 2d 43, 98 S. Ct. 2170 (1978). In Sanbria, supra, the petition was filed one day out of time and

the petitioner had filed a motion, supported by affidavits.

In discussing Rules of the Supreme Court, Rule 22(2) (now Rule 20), Mr. Justice Harlan in Schacht v. United States, 398 U.S. 58, 26 L. Ed. 2d 44, 90 S. Ct. 1555 (1970) stated:

> "Although I therefore conclude that this Court possesses the discretion to waive the time requirements of Rule
> [398 US 69]
> 22(2), it must be recognized that such requirements are essential to an orderly appellate process. Consequently, I believe our discretion must be exercised sparingly, and only when an adequate reason exists to excuse noncompliance with our Rules. In the present case, I agree with the Court that petitioner has adequately explained why he failed to meet our time requirements."

In this instant case the writ should be denied as the petition was filed 47 days late, there was no

request for any extension of time, and there was no good cause shown for the delay.

2. THE QUESTION OF THE ADMISSIBILITY OF FINGER-PRINT COMPARISON EVIDENCE WAS NOT ADDRESSED BY THE COURT OF APPEALS AND WAS NOT EXPRESSLY REVIEW-ED BY THE ALABAMA SUPREME COURT.

The one issue reviewed by the Alabama Court of Criminal Appeals was stated in their opinion (Petitioner's Appendix "A" page 2) as:

> "Appellant filed a pretrial motion seeking to have his confession suppressed and his arrest declared illegal. A full blown hearing was held on this motion and much testimony was taken. At the conclusion of the hearing the motion to suppress was overruled and denied."

The appellate court considered the admissibility of the confession only and reversed the case in light of Dunaway

v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).

Although the Supreme Court of Alabama referred to the issue under review as involving fingerprints and confession the Supreme Court did nothing more than review the opinion of the appellate court, reverse the decision involving the confession in light of Dunaway, and set forth a discussion of the harshness of the exclusionary rule.

Where the issue of the admissibility of the fingerprint comparison was not addressed by the appellate court and not expressly reviewed by the State Supreme Court, a jurisdictional question is raised. In Street v. New York, 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969) it was held that where a question is not presented to the State courts in such a manner that it is

decided by the highest court of the State when it affirms the conviction, then the Supreme Court has no power to consider the matter.

3. THE ALABAMA SUPREME COURT PROPERLY FOUND THE DEFENDANT'S CONFESSION ADMISSIBLE IN LIGHT OF DUNAWAY.

The Alabama Court of Criminal Appeals considered the one issue of the admissibility of the defendant's voluntary confession based upon circumstances comprising less than probable cause and reversed the trial court's conviction in light of Dunaway.

The Alabama Supreme Court properly reversed the Court of Criminal Appeals on the basis that the taint of an illegal arrest had been attenuated by the following factors as set forth in Dunaway:

1. The temporal proximity of the arrest and the confession. In Dunaway there was less than two hours between the arrest and the confession. In Taylor v. State, 399 So. 2d 881 (1981), more than six hours had lapsed between the arrest and the confession and the defendant had been advised of his Miranda rights on three occasions.

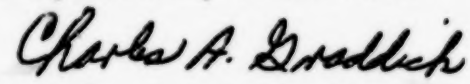
2. The presence of intervening circumstances. In Dunaway there were no intervening circumstances. In Taylor the defendant was placed in a lineup where the victims were unable to identify him, an arrest warrant was obtained on the basis of fingerprint comparisons, the defendant was advised of his rights on three occasions, and he had a private conversation with his girlfriend and a male comparison all prior to his confession.

3. The purpose and flagrancy of the official misconduct. In Dunaway the defendant's arrest was purely investigatory and the officers maintained the defendant was merely "detained." In Taylor the investigation was focused on one person, Omar Taylor. Officers advised Taylor upon taking him into custody that he was under arrest for the robbery of Moseley's Grocery. Officer's had a description of the robber, had a set of latent prints from the crime scene, and had information naming Taylor as the robber. Although the reliability of the informant was not proven, officers had reason to believe the informant's information was accurate as (1) the informant was in jail on pending cases and desperately needed help in exchange for reliable information and (2) the informant was a suspect in the same robbery.

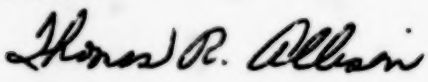
CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.



/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA

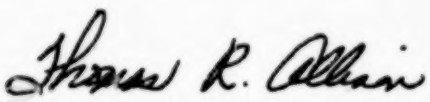


/s/ Thomas R. Allison
THOMAS R. ALLISON
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

CERTIFICATE OF SERVICE

I hereby certify that on this the 26th day of August, 1981, I served three copies of the foregoing Brief and Argument in Opposition to Petition for Writ of Certiorari on the Supreme Court of Alabama and the attorney for petitioner by placing same in the United States mail, postage prepaid and properly addressed as follows:

Honorable Robert M. Beno
20 Commerce Row
529 South Perry Street
Montgomery, Alabama 36104



/s/ Thomas R. Allison
THOMAS R. ALLISON
ASSISTANT ATTORNEY GENERAL
OF ALABAMA
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150